Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 85-1986

THERON W. ANDERSON,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

HAROLD M. BROWN
ATTORNEY GENERAL OF THE
STATE OF ALASKA

By: David Mannheimer
and Robert D. Bacon
Assistant Attorneys General

Office of Special Prosecutions and Appeals
1031 W. 4th Ave.
Suite 318
Anchorage, Alaska 99501
(907) 279-7424

QUESTION PRESENTED

Whether a state criminal defendant has a federal constitutional right to be represented at trial by a person who is not licensed to practice law?

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JURISDICTION

While the State of Alaska does not dispute that this petition is within the jurisdiction of the Court, it appears that the petition should name the Court of Appeals of Alaska, not the Supreme Court of Alaska. The action of the Supreme Court of Alaska in this case was confined to summary denial of a discretionary petition for hearing. See Callender v. Florida, 383 U.S. 270 (1966); R. Stern & E. Gressman, Supreme Court Practice § 6.21 (6th ed. 1986).

STATEMENT OF THE CASE

Petitioner Theron W. Anderson was charged in the District Court of the State of Alaska, Third Judicial District, at Palmer, Alaska, with driving while intoxicated, a misdemeanor carrying a maximum sentence of one year in prison. He requested that he be permitted to be represented at trial by a friend who was not licensed to practice law. The court

refused to permit this, and Anderson represented himself at trial and was convicted.

Still proceeding pro se, Anderson appealed his conviction to the Alaska Court of Appeals, which affirmed in an unpublished opinion. The court relied on its recent decision in Skuse v. State, 714 P.2d 368 (Alaska App. 1986), in which it had rejected a similar claim. (Anderson in the appendix to his petition quotes only the dispositive sentence of the Memorandum Opinion and Judgment issued by the Alaska Court of Appeals. The State sets forth the complete text of the Memorandum Opinion and Judgment as an appendix to this response.) The Alaska Supreme Court denied his discretionary petition for hearing.

SUMMARY OF ARGUMENT

A state criminal defendant has no federal constitutional right to be represented at trial by a person who is not licensed to practice law. The lower courts are unanimous on this principle and review by this Court is unnecessary.

ARGUMENT: CERTIORARI SHOULD BE DENIED

Anderson demanded to be represented at trial by a person who was not licensed to practice law. He did not desire the services of a member of the bar. When the trial court refused to permit a layman to represent him, he went to trial pro se. When Anderson says he never waived his right to "counsel," he is using this term to include a right to be represented by a lay person. Since he had no right to lay representation, his failure to waive that "right" is irrelevant.

Courts are unanimous in holding that a criminal defendant's Sixth Amendment right to counsel does not include a right

to be represented by a person who is not licensed to practice law. E.g., United States v. Benson, 592 F.2d 257 (5th Cir. 1979); United States v. Taylor, 569 F.2d 448, 450-51 (7th Cir.), cert. denied, 435 U.S. 952 (1978); United States v. Wilhelm, 570 F.2d 461 (3d Cir. 1978); United States v. Grismore, 546 F.2d 844, 847 (10th Cir. 1976)(disbarred lawyer); United States v. Whitesel, 543 F.2d 1176, 1177-80 (6th Cir. 1976), cert. denied, 431 U.S. 967 (1977); United States v. Kellev, 539 F.2d 1199, 1201-03 (9th Cir.), cert. denied, 429 U.S. 963 (1976); United States v. Hinderman, 528 F.2d 100, 102-03 (8th Cir. 1976); Lebrun v. State, 339 S.E.2d 227 (Ga. 1986); State v. Brake, 715 P.2d 970 (Idaho 1986); State v. Benson, 376 N.W.2d 36, 37-39 (N.D. 1985); State ex rel. Stephan v. O'Keefe, 686 P.2d 171, 181-82 (Kan.), cert. denied, 105 S.Ct. 596 (1984); Kimble v. State, 451 N.E.2d 302, 307 (Ind. 1983); State v. Spurgeon, 265 N.W.2d 224, 225-26 (Neb. 1978); Skuse v. State, 714 P.2d 368, 369-70 (Alaska App. 1986); State v. Thrall, 464 A.2d 854, 859 (Conn. Super.

1983); Seattle v. Shaver, 597 P.2d 935 (Wash. App. 1979). Anderson cites no cases to the contrary in his petition, and there appear to be none.

To similar effect, in Harrison v. United States, 387 F.2d 203, 212 (D.C. Cir. 1967), rev'd on other grounds, 392 U.S. 219 (1968), the District of Columbia Circuit held that a defendant represented by an unlicensed person who falsely claimed to be a lawyer was denied his Sixth Amendment right to counsel. See also Georgiades v. Martin-Trigona, 729 F.2d 831, 834 (D.C. Cir. 1984)(civil litigant may not be represented in trial court by an unlicensed person); Herrera-Venegas v. Sanchez-Rivera, 681 F.2d 41 (1st Cir. 1982)(prison inmate appealing adverse decision in a civil case may not be represented in the court of appeals by an unlicensed person); Weber v. Garza, 570 F.2d 511 (5th Cir. 1978)(petitioner for habeas corpus has no right to be represented by a lay person).

This case does not concern a defendant's right to defend himself pro se under Faretta v. California, 422 U.S.

806 (1975). Anderson argues that the right to rely on a lay advocate in the courtroom is a necessary corollary of a defendant's right under Faretta to reject all assistance and represent himself, or else a corollary of the history of the right to counsel discussed in Faretta. Courts which have considered these arguments have uniformly rejected them. Wilhelm, 570 F.2d at 465-66; Taylor, 569 F.2d at 451; Whitesel, 543 F.2d at 1178-79; Benson, 376 N.W.2d at 38; Skuse, 714 P.2d at 369-70.

Nor does this case concern Anderson's right to seek advice about his defense outside the courtroom from anyone he wishes, whether that person is licensed to practice law or not. The State readily concedes that Anderson was entitled to do so.

There may be marginal contexts in which reasonable people could differ about whether or not particular activity constitutes the practice of law forbidden to lay people. But this case does not concern any such marginal activity. This case concerns advocacy in the courtroom

for a criminal defendant during a jury trial for an offense carrying a maximum penalty of one year in prison. This is unquestionably the practice of law. Cf. Georgiades, supra, 729 F.2d at 834 (representing civil litigant in trial court is the practice of law, limited to licensed attorneys); Herrera-Venegas, supra, 681 F.2d at 42 (representing civil appellant in the court of appeals is the practice of law, limited to licensed attorneys); Weber, supra, 570 F.2d at 514 (preparation and filing of written pleadings and briefs is the practice of law, limited to licensed attorneys).

Anderson relies on United States v. Tarlowski, 305 F.Supp. 112 (E.D.N.Y. 1969), which concerned a person's right to receive tax advice from his accountant while he was being investigated by the Internal Revenue Service. But it is plain from the authorities set forth earlier in this response that, if a tax dispute led to an indictment in the United States District Court for a criminal tax offense, the defendant would have no Sixth Amendment right to have the

accountant, rather than a lawyer, as his advocate before the jury.

This Court has recognized the states' compelling interest in regulating the practice of law and in imposing standards for licensing attorneys. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792-93 (1975). The Court has also recognized that "the [Sixth Amendment] right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686 (1984), quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

Given these principles, the rejection of a Sixth Amendment right to the assistance of an unlicensed lay person at a criminal trial is soundly based and is not in need of reconsideration. Many courts have considered the rationale for this rule to be too obvious to need exposition. On the other hand, a detailed analysis, including reference to some of the history Anderson cites, is set forth in Turner v. American Bar Ass'n., 407 F.Supp. 451, 472-78 (N.D. Tex. & others 1975), aff'd, 539 F.2d 715

(7th Cir. 1976) and 542 F.2d 56 (8th Cir. 1976).

The Supreme Court of Kansas said, in holding that prison inmates not licensed to practice law could not represent other inmates in civil litigation:

> One of the many good reasons for distinguishing assistance and representation is that a party may be bound, or his rights waived, by his legal representative. When that representative is a licensed attorney there are grounds for belief that the representative's character, knowledge and training are equal to the responsibility. In addition, remedies and sanctions are available against a lawyer that are not available against the fellow inmate, including misconduct sanctions and malpractice actions. Conversely, if a party inmate commits a costly procedural or other error, the fault is his own and may not be shifted to his in-house advisor, because the right to assistance protected by case law is meant to further access to the courts, not to shield an inmate against

> responsibility for errors once access has been obtained. Herrera-Venegas v. Sanchez-Rivera, 681 F.2d 41 (1st Cir. 1982).

Stephan, supra, 686 P.2d at 182.

CONCLUSION

This case is not about the Sixth Amendment right to counsel. The Sixth Amendment does not entitle a defendant to have as his advocate at trial a person who has not been entrusted with a license to practice law. The unanimity with which the courts have rejected claims such as Anderson's makes plenary consideration by this Court unnecessary. Anderson was not denied anything to which the Constitution entitles him. His

petition should be denied.

Respectfully submitted October 16, 1986, at Anchorage, Alaska.

HAROLD M. BROWN
ATTORNEY GENERAL OF
THE STATE OF ALASKA

By: David Mannheimer
David Mannheimer
Assistant Attorney General

By: Robert D. Bacon
Robert D. Bacon
Assistant Attorney General

APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF ALASKA

THERON W. ANDERSON,	)	
	)	
Appellant,	)	File No. A-981
	)	
v.	)	MEMORANDUM OPINION
	)	
STATE OF ALASKA,	)	AND JUDGMENT*
	)	
Appellee.	)	[No. 1082 -
	)	February 19, 1986]

Appeal from the District Court of the State of Alaska, Third Judicial District, Palmer, Michael N. White, Judge.

Appearances: Theron W. Anderson, Wasilla, in propria persona, for Appellant. Steven H. Morrissett, Assistant District Attorney, Palmer, and Harold M. Brown, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

SINGLETON, Judge.

Theron W. Anderson was tried and convicted of driving while intoxicated, AS 28.35.030(a).

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*Entered pursuant to Appellate Rule 214 and Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3).

He appeals. We affirm.

Anderson first argues that he was denied his constitutional right to counsel of his choice, i.e., a lay person. We addressed a similar argument in Skuse v. State, ___ P.2d ___, Op. No. 582 (Alaska App., February 14, 1986). In Skuse, we declined to decide whether the trial has limited discretion to permit a defendant to be represented by a lay person, because we found no possibility of an abuse of discretion absent a court showing of prejudice. Anderson has not made a showing of prejudice. We therefore find no abuse of discretion in the trial court's decision denying Anderson the right to be represented by a lay person.

Anderson contends that he was denied pretrial discovery pursuant to Alaska R. Crim. P. 16 regarding the medical condition of the arresting officer. The remedy for a discovery abuse is a continuance. See Christie v. State, 580 P.2d 310 (Alaska 1978). Anderson did not seek a continuance and he has not established any prejudice from the denial of discovery. We

therefore find no error.[1]

Anderson next argues that the trial court erred in not dismissing the prosecution against him for violation of Alaska's speedy-trial rule. Alaska R. Crim. P. 45. Anderson concedes that the supreme court construed Rule 45 to allow up to thirty days of excluded time to permit the trial court to rule on motions. See State v. Clouatre, 516 P.2d 1189, 1190-91 (Alaska 1973). Anderson suggests that we not follow Clouatre. Anderson errs. This court has no authority to ignore binding precedent of the Alaska Supreme Court. Were, as here, it appears that motions were filed and up to thirty days were, in fact, spent in their resolution, the time is excluded. We find no error.

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[1]Where a party contends that he has insufficient time at trial to obtain evidence and that the trial court erred in denying a continuance to obtain the evidence, we have failed to find prejudice where the defendant has not, subsequent to trial, sought leave of court to gather the evidence in aid of his appeal. We are not prepared to grant a new trial to a party to enable that party to produce evidence which, in fact, may not exist. A demonstration that favorable evidence exists is a prerequisite to a new trial for failure to grant pretrial discovery.

Anderson asserts that the trial court erred in precluding him from questioning the jury regarding nullification during voir dire. He concedes that he is not entitled to a nullification instruction, but reasons that he had the right to explore the issue of nullification with the jury in order to determine their philosophy and aid him in deciding which jurors to peremptorily challenge and which jurors to challenge for cause. The trial court has broad discretion in regulating voir dire. The trial court has the right to prevent parties and their counsel from questioning the jury about particular issues or questions of law. The doctrine of nullification has been expressly rejected by this court, Hartley v. State, 653 P.2d 1052, 1055 (Alaska App. 1982), and is not a proper subject for voir dire. Having reviewed the record, we are satisfied that Anderson had sufficient information to intelligently exercise peremptory challenges and protect himself against juror bias. See Bolhouse v. State, 687 P.2d 1166, 1172 (Alaska App. 1984). We find no error in the trial court's handling of the voir dire examination.

The judgment of the district court is AFFIRMED.